93-941

Supreme Court, U.S.
FILED
DEC 15 1993
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In The

Supreme Court of the United States

October Term, 1993

THE CITY OF DETROIT and COLEMAN A. YOUNG,

Petitioners,

vs.

RONALD H. BROWN, SECRETARY OF COMMERCE OF THE UNITED STATES, and BARBARA H. BRYANT, DIRECTOR OF THE UNITED STATES BUREAU OF THE CENSUS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Apportionment Clause of the Constitution imposes a judicially cognizable obligation on the Census Bureau to submit an official population count for each state and for the cities and sub-units within each state that as accurately as possible includes all persons reasonably capable of being determined to reside within each state and within each city and sub-unit of a state.

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THE CITY OF DETROIT and COLEMAN A. YOUNG,

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PETITION FOR A WRIT OF CERTIORARI

The City of Detroit, and Coleman A. Young, individually and as Mayor, City of Detroit, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been officially reported: *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993). It is set out in the Appendix. The opinion of the United States District Court for the Eastern District of Michigan has been reported at 800 F. Supp. 539 (E.D. Mich. 1992), and is contained in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is the Apportionment Clause, Art. I, Cl. 3, as amended by Amend. XIV, § 2. That provision provides in pertinent part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative. . .

STATEMENT OF THE CASE

A. Background and Proceedings Below

This case is an effort to remedy the well-documented and long-standing problem of large numbers of minorities and inner-city residents not being counted during the taking of the decennial census. The plaintiffs-petitioners are the City of Detroit and its Mayor, Coleman A. Young, suing individually and in his official capacity as Mayor, City of Detroit. Defendants-respondents are Ronald H. Brown, currently the Secretary of Commerce of the United States (substituted for Robert A. Mosbacher and Barbara H. Franklin), and Barbara E. Bryant, Director of the United States Bureau of the Census.

The complaint was filed in the United States District Court for the Eastern District of Michigan on July 25, 1991, with federal jurisdiction premised on 28 U.S.C. §1331, alleging two counts of constitutional violation. The constitutional basis of both counts is that the Apportionment Clause, Art. I, § 2, Cl. 3, imposes a judicially cognizable obligation on the Census Bureau[1] to submit an official population count for each state and for the cities and sub-units of each state that as accurately as possible includes all persons reasonably capable of being determined to reside within each state and within each city and sub-unit of a state. Count I, the undercount claim, alleged that the manner in which the Census Bureau conducted the 1990 decennial census in the City of Detroit resulted in a serious undercount in that large numbers of persons

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1. As a theoretical matter, this obligation is imposed on the Congress, which is required under the Apportionment Clause to provide by law for the taking of the decennial census. Under 13 U.S.C. § 143, Congress has directed the Secretary of Commerce to take the 1990 decennial census, and the Secretary in turn has delegated this responsibility to the United States Bureau of the Census. For these reasons it is convenient for purposes of the present litigation to refer to the constitutional obligation as being imposed on the Census Bureau.

actually resident in the City of Detroit were not tabulated and so were not included in the City's official population count. Count II, the statistical adjustment claim, alleged that the refusal of the Secretary of Commerce to accept the recommendation of the Director of the Census Bureau that a statistical adjustment be made to the population count derived from the census alone was unconstitutional as applied to the failure to adjust the official population count of the cities and sub-units in the State of Michigan for the racially differential undercount. The plaintiffs claimed that as a result of the breach of the asserted constitutional obligation in these two respects, the plaintiff Young's representation and weight of vote in the United States House of Representatives (and that of other residents of the City of Detroit) was diluted relative to that of other citizens of Michigan when the official population count of the cities and sub-units of the State of Michigan, as reported and certified by the Census Bureau, was used in the reapportionment of Michigan's congressional representation following the 1990 decennial census.

The District Court granted the defendants' motion for summary judgment on both counts of the complaint on the ground, *inter alia*, that the plaintiffs "failed to state a violation of any judicially enforceable constitutional right." The Court of Appeals affirmed the granting of summary judgment on this ground.[2]

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2. The District Court also held that the plaintiffs lacked standing to assert their constitutional claims. The Court of Appeals held that the City of Detroit had standing to assert its constitutional claim, because the officially reported census data is used to allocate federal funds to the city. The Court of Appeals, however, held that the plaintiff Young lacked standing to assert his constitutional claim, because the Census Bureau's certification of the official population count to the State of Michigan was not the "legal cause" of the injury to his claimed right to equal representation and equal weight of vote in the United States House of Representatives.

B. The Facts Relating to the Undercounting of the City of Detroit in the 1990 Decennial Census [3]

The official population count of the City of Detroit in the 1990 decennial census was 1,027,974, consisting of 777,916 blacks and 250,058 non-blacks, giving the City of Detroit a black population of 75.7%. The black population of the State of Michigan was 1,291,706 out of a total population of 9,295,297, giving the State of Michigan a black population of 13.9%. Fully, 60% of Michigan's black population, according to the official count reside within the City of Detroit, and the remaining 513,790 black persons reside in significant numbers only in relatively few other cities. In the overwhelming number of Michigan's cities and sub-units, there is little or no black population. City of Detroit demographers have estimated that the population of the City of Detroit as of April 1, 1990, was 1,122,659.

As in past decennial censuses, the 1990 decennial resulted in a differential racial undercount, with blacks being undercounted disproportionately to whites. According to figures derived from the Post-Enumeration Survey ("PES") that was conducted by the Census Bureau after the census headcount, the black undercount rate on the national level was 4.8%, compared to a 1.7% undercount rate for whites. According to the undercount figures for the State of Michigan derived from the PES, Michigan's undercount was 108,706, with an undercount for Detroit of 37,026, or approximately 34% of the total. Thus, it is not disputed, looking to the PES figures, that the City of Detroit, with its large black population, was disproportionately undercounted in relation to all

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3. The facts relating to the undercounting of the City of Detroit in the 1990 decennial census, as alleged in the plaintiffs' complaint, must, of course, be assumed to be true for purposes of the defendants' summary judgment motion. However, the essential facts are not in dispute, and are set forth fully in the opinion of the Court of Appeals. *City of Detroit v. Franklin*, 4 F.3d 1369-1372.

or virtually all of Michigan's other cities and sub-units, which are all-white or have substantially lower black populations than the City of Detroit.[4] When the official population count of the census was used to reapportion Michigan's congressional representation,[5] it followed that the residents of the City of Detroit, which was disproportionately undercounted in relation to all or virtually all of Michigan's other cities and sub-units, received proportionately less congressional representation than was received by the residents of the other cities and sub-units in the State of Michigan.

The plaintiffs' undercount claim in the present case related to the way that the Census Bureau conducted the census in Detroit and is based on facts specific to the City of Detroit. The facts relating to the way in which the census was conducted in Detroit and to the basis of the plaintiffs' undercount claim are set out fully in the opinion of the Court of Appeals *City of Detroit v. Franklin, supra*, at 1369-1372. The Bureau conducted the census in Detroit and elsewhere, pursuant to a census design known as the mailout-mailback procedure. This design was based on the compilation of a computerized list of housing units to be counted, referred to as an address control file or "ACF." The plaintiffs alleged that the ACF for Detroit was seriously inaccurate and incomplete because it was based on a mailing list purchased from a commercial mailer that was highly unlikely to include a large number of low-income persons residing in the City of Detroit. The plaintiffs further

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4. The unadjusted population count for the City of Detroit amounts to only 11% of Michigan's total population. Thus, the figures derived from the PES, show that Detroit, with its 75.9% black population, was undercounted at approximately three times the undercount rate for Michigan as a whole — the same undercount rate for blacks and non-blacks in the nation as a whole according to the PES.

5. The reapportionment was carried out by the United States District Court for the Eastern District of Michigan after the Michigan Legislature failed to do so. *Good v. Austin*, 800 F. Supp. 577 (E. & W.D. Mich. 1992) (three-judge court).

alleged that the "updating" procedures used by the Census Bureau to enhance the completeness and accuracy of the ACF were inadequate for this task[6] in the City of Detroit for a number of reasons, relating primarily to the City's large low-income population and to geographical features peculiar to the City, such as the large number of freeways cutting through residential areas inhabited by low-income persons.[7] If the case had been permitted

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6. To illustrate, Michigan, with an officially reported population count of 9,295,297, was entitled to 16 seats in the United States House of Representatives, so that each congressional district should have approximately 580,956 persons. With an officially reported count of 1,027,974, the City of Detroit would embrace 1.769 congressional districts. If an adjustment for the racially differential undercount had been made in accordance with the PES, Michigan's total population would be approximately 9,404,000, so that each congressional district would contain approximately 587,750 persons. With an adjusted population count of 1,065,000 according to the PES, the City of Detroit would embrace 1.811 congressional districts instead of 1.769 congressional districts.

7. The inaccuracy and incompleteness of the ACF for the City of Detroit was demonstrated in part by a survey conducted by the Michigan Consolidated Gas Company. This survey identified a number of areas in the City of Detroit where people were in fact living, since they were customers of Michigan Consolidated, but did not receive census forms because their addresses were not on the ACF. The ACF for Detroit was also hampered by a misalignment between the unique topographical features of Detroit, namely a large number of freeways intersecting in the city, and an older postal zone configuration creating pockets of addresses where mail was not delivered. These missed addresses were not likely to have been picked up by the United States Postal Service when conducting the Advanced Post Office Check ("APOC"), and so would not have been added to the ACF.

The inaccuracy and incompleteness of the ACF for the City of Detroit was further demonstrated by the results of the "Were You Counted" campaign. The "Were You Counted" campaign added 47,100 people to the city's population. All

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to come to trial, the plaintiffs would have demonstrated in detail the inaccuracy and incompleteness of the ACF for the City of Detroit, and the resulting substantial undercount of the City's population during the taking of the census.

C. The Facts Relating to a Statistical Adjustment for the Racially Differential Undercount Within the State of Michigan.

The basis of the plaintiff's statistical adjustment claim is that because of the concentration of Michigan's black population within the City of Detroit and a few other areas in Michigan, a statistical adjustment for the racially differential undercount within the State of Michigan, under *any* method of adjustment, would produce an official population count for the cities and sub-units of the State of Michigan that, on balance, would be more accurate, or "closer to the truth," than an official population count based on the raw unadjusted data alone. The plaintiffs' statistical adjustment claim in the present case is the "Michigan version" of the "national statistical adjustment" claim being litigated by the City of New York and a number of other cities in *City of New York v. United States Department of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993) (judgment for the defendants rendered).

Pursuant to a stipulation entered into in the *New York City* case, the Census Bureau conducted a Post-Enumeration Survey ("PES") to determine the nature and extent of the undercount in the 1990 decennial census. As pointed out previously, the data from

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of these persons were missed during the taking of the census,because their addresses were not on the ACF. There were another 20,841 people identified on the "Were You Counted" forms who had not been counted during the taking of the census, but "whose existence the Bureau could not verify," so they were not added to the official population count.

the PES indicated that the black undercount rate on the national level was 4.8%, compared to a 1.7% undercount rate for whites. The data also indicated that the undercount for the City of Detroit was 37,026 out of Michigan's total undercount of 108,708. Following the reporting of the results of the PES, the professional staff of the Census Bureau and an advisory committee recommended that an adjustment be made to the official population count of the 1990 census on the basis of the data derived from the PES. Dr. Barbara E. Bryant, the Director of the Census Bureau, made a recommendation to the then-Secretary of Commerce, Robert A. Mosbacher, that such an adjustment be made. Notwithstanding the recommendation of Director Bryant, on July 15, 1991, Secretary Mosbacher announced that he had made the decision against any statistical adjustment in the official population count of the 1990 census, either on a nationwide or state-by-state basis.[8]

If the present case had been permitted to come to trial, the plaintiffs' expert witnesses would have testified that an adjustment for the racially differential undercount within the State of Michigan, under any method of adjustment, would have produced a more accurate official population count for the cities and sub-units of the State of Michigan than an official population count based on the raw unadjusted data alone. Their testimony in this regard would also have been supported by the large volume of scientific material generated by the professional staff of the Census Bureau and contained in the Director's Recommendation.

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8. In the *New York City* case, the District Court held that the Secretary's refusal to adjust for the undercount on a nationwide basis, in light of the guidelines promulgated in accordance with the stipulation, was not "arbitrary and capricious," and so did not violate the guidelines, the Administrative Procedure Act, or the Constitution.

D. The Decision of the Court of Appeals

The Court of Appeals held that the plaintiffs had not "stated a violation of any judicially enforceable constitutional right." *City of Detroit v. Franklin, supra* at 1375-1376. As regards the plaintiffs' undercount claim, the Court of Appeals held that the only judicially enforceable constitutional right created by the Apportionment Clause, Art. I, § 2, Cl. 3, was that the Census Bureau conduct a good-faith enumeration and that it not intentionally reduce some group's representation in the Congress. *Id.* at 1376. The Court of Appeals specifically rejected the plaintiffs' contention that the Apportionment Clause permits a constitutional challenge to the way that the census was conducted in a particular city and that the Apportionment Clause requires that the Census Bureau make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all persons reasonably capable of being determined to reside therein. *Id.* at 1376.[9]

As regards the plaintiffs' statistical adjustment claim, the Court of Appeals held that this claim was not cognizable under the Apportionment Clause, because there were no "judicially administrable standards" under which the claim could be determined. (*Id.* at 1378). The Court of Appeals also said that the plaintiffs' request for a statistical adjustment for Michigan alone "cannot be considered in isolation," so that what the plaintiffs were really seeking was a nationwide adjustment, the prospect of which

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9. The Court of Appeals went on to say that such a constitutional challenge was also inappropriate because the Census Bureau undertook "extraordinary efforts to conduct as accurate a census count as possible." *Id.* at 1376. And discounting the evidence that the plaintiffs had identified during the pre-trial stage of the litigation, as well as the evidence the plaintiffs showed they would present if the case had been permitted to come to trial, the Court of Appeals said that, "[i]t is clear that the defendants have counted the residents of the City of Detroit as accurately as possible." *Id.* at 1377.

had already been rejected in the *New York City* case. *Id.* at 1378.[10]

Because the Court of Appeals held that the plaintiffs had not "stated a violation of any judicially enforceable constitutional right," it affirmed the judgment of the District Court granting the defendants' summary judgment motion.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS RENDERED A DECISION THAT IS IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON THE SAME MATTER.

In the present case, the Court of Appeals held that the plaintiffs' undercount and statistical adjustment claims under the Apportionment Clause, Art. I, § 2, Cl. 3, had not "stated a violation of any judicially enforceable constitutional right." *Id.* at 1375-1376. The Court of Appeals then has interpreted the Apportionment Clause as not providing a textual basis for a constitutional claim that the Census Bureau is required to make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all persons

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10. The plaintiffs, however, were only seeking an adjustment within the State of Michigan, and it is not disputed that an adjustment for the State of Michigan alone would have no effect whatsoever on the distribution of congressional representation nationally. That is, even if 108,708 persons were added to Michigan's total population, this would not entitle the State of Michigan to an additional seat in the United States House of Representatives. The sole effect of an adjustment within the State of Michigan,therefore, would be to increase the representation of residents of the City of Detroit in the United States House of Representatives relative to the representation of residents of the other cities and sub-units within the State of Michigan.

reasonably capable of being determined to reside therein. *Id.* at 1376.

The Court of Appeals' decision on this matter squarely conflicts with the decision of the United States Court of Appeals for the Second Circuit on the same matter in *Carey v. Klutznick*, 637 F.2d 834 (2d Cir.1980). In this case, the City of New York and New York State challenged the manner in which the Census Bureau conducted the 1980 census. Like the plaintiffs in the present case, they based their claim on the Apportionment Clause and alleged that the census was conducted in such a manner that would inevitably result in an undercount, which would not be evenly distributed across the state, but would instead occur at a higher rate in low-income areas populated largely by members of minority groups. And like the plaintiffs in the present case, the gravamen of their claim rested on the inaccuracy of the Address Control File prepared for New York City, *Id.* at 836. They also sought an adjustment for the racially differential undercount. *See Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987), where their claims were tried on the merits.

As in the present case, the defendants in *Carey v. Klutznick* argued that the allegations as to the mismanagement of the census alleged in the complaint failed to state a justiciable claim under the Apportionment Clause. The Second Circuit emphatically rejected this contention. It noted that if the procedures used to conduct the census resulted in a disproportionate undercount in New York City, this could deprive the state and the city of the congressional representation to which they were entitled under the Constitution. Since this result would be inconsistent with the constitutional requirement of "equal representation for equal numbers of people" in the United States House of Representatives, *Wesberry v. Sanders*, 376 U.S. 1,7-8 (1964), the Second Circuit concluded that the plaintiffs had stated a justiciable claim under the Apportionment Clause. *Carey v. Klutznick, supra* at 839. Stated

simply, the Second Circuit held that the claim was justiciable, because the Apportionment Clause requires that Congress be fairly apportioned on the basis of accurate census figures. *Id.*

As a result of the Second Circuit's decision in *Carey v. Klutznick*, the challenge of New York City and New York State to the accuracy of the official count of their populations in the 1980 decennial census was determined on the merits. *Cuomo v. Baldridge, supra.* For the same reason, the challenge of New York City and a number of other cities and states to the failure of the Secretary of Commerce to adjust for the racially differential undercount in the 1990 census was likewise determined on the merits. *See City of New York v. United States Department of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989).[11] The plaintiffs in the present case, however, because they are located within the jurisdiction of the Sixth Circuit, have been denied the opportunity to have their undercount and statistical adjustment claims determined on the merits. Unlike the residents of New York City and the other locales within the jurisdiction of the Second Circuit, they have been told that their identical constitutional claims do not "state a violation of any judicially enforceable constitutional right." Like the Sixth Circuit,the Seventh Circuit has also held that a statistical adjustment claim is not judicially cognizable under the Apportionment Clause. *Tucker v. United States Department of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, __U.S. __, 113 S. Ct. 407 (1992).

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11. As the District Court stated in that case: "In *Carey v. Klutznick, supra*, 637 F.2d at 839, the Second Circuit, quoting *Wesberry v. Sanders*, supra, stated that Article I, § 2 of the Constitution means that 'as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's, and that our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal.' Plaintiffs' claim that the Secretary's decision not to adjust the enumeration results in an undercount and a loss of political representation necessarily arises under Article I, § 2." 713 F. Supp. at 54.

The Courts of Appeal, therefore, are sharply divided over the fundamental constitutional question of whether the Apportionment Clause creates a "judicially enforceable constitutional right" on the part of American citizens to challenge the racially differential undercount that has resulted from the manner in which the 1990 decennial census was conducted and from the refusal of the Secretary of Commerce to adjust for that undercount. This Court has long ago recognized the "deplorable public mischiefs" that would result from different judges interpreting the same Constitution differently. It is for this reason that this Court must be the "revising authority to control those jarring and discordant judgments and harmonize them into uniformity," so that the Constitution will not be "different in different states." *Martin v. Hunter's Lessee,* 14 U.S. 304, 348 (1816). While that case involved this Court's constitutional authority to review judgments from the state courts in cases involving federal questions, the same "deplorable public mischiefs" result when the Constitution means different things in different circuits because of "conflicting judgments of United States Court of Appeals on the same matter." Sup. Ct. R. 10.1(a).

This Court should grant the plaintiffs' petition for a writ of certiorari in the present case in order to resolve the conflict among the Courts of Appeal on the question of whether the Apportionment Clause creates a "judicially enforceable constitutional right" to challenge the racially differential undercount of the decennial census and the resulting loss of "equal representation for equal numbers of people" in the United States House of Representatives.

II.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE SETTLED BY THIS COURT.

The undercount of the decennial census has been getting worse. The PES indicated that on the national level, approximately 5,000,000 persons, or 2.1% of entire population, were missed during the taking of the 1990 decennial census. This compares with a 1.3% undercount rate for the 1980 decennial census. As regards the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives, the undercount creates a most serious problem, because it is not randomly distributed. The racially differential undercount has existed for a very long time, and according to the PES figures, in the 1990 decennial census the undercount rate for blacks was about three times that for non-blacks. This means that cities like Detroit, with its 75.6% black population, are disproportionately undercounted in relation to virtually all of Michigan's other cities and sub-units, which are all-white or have substantially lower black populations than the City of Detroit. It also means that when the official population count of the census was used to reapportion Michigan's Congressional representation, residents of the City of Detroit received proportionately less congressional representation than was received by the residents of the other cities and sub-units in the State of Michigan. Thus, within the State of Michigan, there has *in fact* been a violation of the constitutional principle of "equal representation for equal numbers of people" in the United States House of Representatives. *Wesberry v. Sanders, supra* (1964).

The plaintiffs contend that the Apportionment Clause, Art. I, § 2, imposes a judicially cognizable constitutional obligation on the Census Bureau to submit an official population count for each

state and for the cities and sub-units within each state that as accurately as possible includes all persons reasonably capable of being determined to reside within each state and within each city and sub-unit of a state. The Apportionment Clause imposes this obligation, because where, as in the present case, a disproportionate undercount has occurred, when the official population count is used to apportion congressional representation within a state, the reapportionment will not *in fact* take place in accordance with the principle of "equal representation for equal numbers of people."

In the present case, the Court of Appeals held that the Apportionment Clause did not impose such a judicially cognizable obligation on the Census Bureau. According to the Court of Appeals, the only judicially cognizable obligation that the Apportionment Clause imposed on the Census Bureau was to conduct a "good faith enumeration," and not to intentionally reduce some group's representation in the Congress. *City of Detroit v. Franklin, supra* at 1376. But the "good faith" of the Census Bureau in conducting the enumeration is completely irrelevant to the *constitutional distortion* that will have resulted from a racially disproportionate undercount. The subversion of the constitutional function of the decennial census and the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives is no less real because this subversion was done in "good faith."

The racially differential undercount may be expected to continue in future censuses, and so will again result in the subversion of the constitutional objective of "equal representation for equal numbers of people" in the United States House of Representatives. The Courts of Appeal are divided on the question of whether the Apportionment Clause creates a "judicially enforceable constitutional right" to challenge the process that has produced the racially differential undercount and the resulting

denial of equal representation in the United States House of Representatives to residents of cities like Detroit that have a large black population. This question surely satisfies the criterion of "an important question of federal law which has not been, but which should be, settled by this Court." Sup. Ct. R. 10.1(c).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari to review the judgment of the Court of Appeals in the present case should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED JUNE 21, 1993

The CITY OF DETROIT, A Municipal Corporation; and Coleman A. Young, Individually and as Mayor, City of Detroit,

Plaintiffs-Appellants,

v.

Barbara H. FRANKLIN, Secretary of Commerce of the United States; and Barbara E. Bryant, Director of the United States Bureau of the Census,

Defendants-Appellees.

No. 92-2113.

United States Court of Appeals,
Sixth Circuit.

Argued June 21, 1993.

Decided Sept. 22, 1993.

Thomas W. Millet, David M. Glass, U.S. Dept. of Justice, Michael Jay Singer (briefed), U.S. Dept. of Justice, Appellate Staff, Civil Div., Mark B. Stern (argued), U.S. Dept. of Justice, Civil Div., Washington, DC, for defendants-appellees.

Before: KENNEDY and NORRIS, Circuit Judges; and ENGEL, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Appendix A

Plaintiffs-Appellants City of Detroit and its mayor, Coleman A. Young, appeal the District Court's grant of summary judgment in favor of defendants, Director of the United States Bureau of the Census ("Census Bureau") and Secretary of Commerce, in this action challenging the results of the 1990 decennial census. Plaintiffs contend that the Census Bureau and Department of Commerce breached their constitutional obligation to make a tabulation of the population of each state and of each city and sub-unit within a state, that as accurately as possible includes all persons reasonably capable of being determined to reside therein. They assert that the census is deficient because (1) the manner in which the Census Bureau conducted the 1990 census in the City of Detroit resulted in a serious miscount (*i.e.*, undercount of minorities) in that large numbers of persons actually resident in the City of Detroit were missed and so were not included in the official population count and (2) the Secretary of Commerce refused to make a statistical adjustment to the census headcount that would correct the disproportionate undercount of blacks that occurred in Detroit. The plaintiffs claim that as a result of this breach, the individual plaintiff's voting power was diluted relative to other parts of Michigan when the unadjusted census data was used for redistricting purposes and that the City of Detroit will lose a fair share of federal funds allocated on the basis of the census figures. Plaintiffs seek an injunction to compel the responsible parties to make an appropriate statistical adjustment for the racially differential undercount in the 1990 official population count of the cities and sub-units of the State of Michigan or, alternatively, to make a new count of certain areas. For the reasons set forth below, we affirm the grant of summary judgment.

Appendix A

I. Statement of the Case

A. Census Background

The Constitution requires Congress to conduct a decennial census for the purpose of determining the number of representatives in the United States House of Representatives to which each state is entitled. Article I, § 2, cl. 3, of the Constitution provides that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," which requires, by virtue of section 2 of the Fourteenth Amendment, "counting the whole number of persons in each State." The number of persons in each State is to be calculated by "actual Enumeration," conducted every 10 years, "in such Manner as [Congress] shall by Law direct." U.S. Const., Art. I § 2, cl. 3. Congress, in turn, has delegated responsibility for taking the census to the Secretary of Commerce. The Bureau of the Census, an agency within the Department of Commerce, actually conducts the census.

The Census Bureau began to prepare for the 1990 decennial census in 1983. During six years of planning and preparation, the Bureau engaged in extensive consultation with data users, performed a series of "formal tests of alternative procedures and questionnaire content," and conducted a number of "dress rehearsal" censuses. While the parties may disagree on the quality of the census counts achieved in 1990 and the efficacy of the procedures used to conduct the census, the manner in which the census was conducted is largely undisputed.

First: the Census Bureau compiled an address control file ("ACF") — a computerized list of housing units to be counted. In constructing the list, the Census Bureau relied primarily on

commercial mailing lists. The Census Bureau obtained its "Vendor List" for Detroit from ADVO-System, Inc., a large volume mailer of third-class bulk mail. After obtaining the "Vendor Lists," the Census Bureau conducted four precensus update operations to enhance the completeness and accuracy of the ACF. In the summer and fall of 1988, the United States Postal Service conducted an Advance Post Office Check ("APOC") in which it reviewed the addresses on the ACF to identify those that were undeliverable or incorrect. Then, the census enumerators canvassed census blocks looking for and adding census housing units not on the address list (the "Precanvass"). In Detroit, the Precanvass consisted of a complete recanvass of the entire city. The Census Bureau then conducted a "Precensus Local Review," in which the Bureau sent units of local government, including the City of Detroit, maps of the census blocks within their jurisdictions and preliminary counts of the number of housing units and group quarters contained therein. Where a local government asserted inaccuracies in the Census Bureau's data, census enumerators were sent to the challenged block to recheck the number of housing units.[1] Finally, in March 1990, the United States Postal Service conducted a second review of the ACF (the "Casing Check") in which addresses on the updated lists were once again reviewed for deliverability and accuracy.

Second: census questionnaires were mailed to each housing unit. In March 1990, most of the housing units in Detroit contained in the ACF were mailed the census questionnaires which were to be

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1. During this stage, the City of Detroit claimed, on the basis of its Accessor's Files, that there were 436,336 housing units in the city, compared to the 401,279 units listed by the Census Bureau. The Bureau reviewed the City's estimates and also conducted a precanvass review of more than 1,600 of the City's 13,364 census blocks.

mailed back to the Census Bureau (the "Mail Out/Mail Back" procedure). However, for certain low income/high density public housing projects designated by the City of Detroit, the questionnaires were delivered directly by census enumerators to the housing units to which they had been addressed. The Census Bureau also sent enumerators to a variety of other places thought unlikely to produce accurate results (*e.g.*, blocks with boarded up housing; boarding houses; nursing homes; dormitories; rectories; convents; hospitals; YMCA/YWCA). The Census Bureau also embarked on an extensive follow-up campaign in which second mailings were sent to households that failed to return the initial form and in districts with especially low return rates, the Bureau remailed census forms to all residents. *City of New York v. Department of Commerce*, 822 F.Supp. 906 (E.D.N.Y.1993).

Third: The Census Bureau conducted a variety of supplemental enumeration efforts. The principal procedure used by the Census Bureau to count residents of housing units that did not return the completed questionnaires was the "Nonresponse Follow-up." For housing units that failed to return questionnaires, a census enumerator was assigned and directed to make up to six attempts to contact a household member and complete the questionnaire. Additionally, census enumerators personally visited all units reported as vacant or identified for deletion to verify their occupancy status. The Census Bureau also surveyed parole and probation officers to locate individuals (on parole or probation) who might have been missed in the original count.

The Census Bureau also mounted an extensive "Were you Counted?" campaign, in which they asked units of local government, the media, and community-based organizations to encourage people who believed they had been missed during the census enumeration to call one of the Bureau's toll-free numbers or

report data for their household on special forms. Based upon the City of Detroit's participation, the Bureau received 88,525 "were you counted" forms that covered a total of 155,412 individuals. The processing of these forms (both with field verification and without) resulted in the addition of 47,109 people to the population of Detroit, enough to put the City over the one-million mark.[2]

In August 1990, the Census Bureau conducted a "Housing Coverage Check" in which they recanvassed select blocks based upon evidence generated from a computerized search of census questionnaires that identified communities or blocks displaying a low count.

Additionally, the Census Bureau conducted a "Post census Local Review" in which they again provided units of local government with updated maps of the census blocks in their communities and with data showing the preliminary results of the census enumeration. The Census Bureau sent enumerators to recanvass census blocks challenged by local governments. At this stage, the City of Detroit challenged the Census Bureau's count of housing units in 5,613 of the City's 13,364 census blocks. Thereafter, the Census Bureau conducted a postcensus recanvass covering more than 3,800 of the census blocks within Detroit.

B. Results of the 1990 Census

Despite the massive efforts of the Census Bureau, "it is undisputed that the 1990 Census was not — and could not realistically be — successful in its goal of achieving an exact count

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2. Of the remaining 107,303 individuals who were not added, 86,462 were individuals whom the Bureau had already counted while the other 20,841 were individuals whose existence the Bureau could not verify.

of the nation's population." *City of New York,* at 913. *See also Tucker v. United States Department of Commerce,* 958 F.2d 1411, 1412 (7th Cir.) ("The census takers try to account for everybody in America, but of course they don't succeed . . . ."), *cert. denied,* ___ U.S. ___, 113 S.Ct. 407, 121 L.Ed.2d 3332 (1992). As with previous censuses, the 1990 census resulted in a net national undercount (of about five million people), with blacks and other minorities undercounted to a greater degree than non-Hispanic whites. *See Tucker,* 958 F.2d at 1412 ("There is reason to believe . . . that the undercount is not randomly distributed, but instead is concentrated in the poor, among whom blacks and Hispanics are disproportionately represented . . . ."). Specifically, according to the figures derived from the Post-Enumeration Survey ("PES") that was conducted by the Census Bureau after the census headcount, the black undercount rate on the national level was 4.8%, compared to a 1.7% undercount rate for whites.[3]

In response to litigation filed by the States of California and New York in the Second Circuit, the Census Bureau agreed to conduct a comprehensive review of the undercount problem. On July 15, 1991, the Secretary concluded that an adjustment should not be undertaken because:

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3. The official population count of the City of Detroit, as reported by the Secretary of Commerce, was 1,027,974, representing 777,916 blacks and 250,058 non-blacks (giving the City of Detroit a black population of 75.7%). The black population for the State of Michigan totalled 1,291,706 out of a total population of 9,295,297 (giving the State of Michigan a black population of 13.9%).

Moreover, applying the percentages of the national Post-Enumeration Survey, Michigan's undercount would total 108,708, with the undercount for Detroit totalling 37,026.

> while adjustment by the best method available would increase the census totals, it would not significantly alter the apportionment of seats in the House of Representatives among the states, in part because there is overcounting as well as undercounting. After the dust settled, [Michigan's] representation would be unchanged, although California and Arizona would pick up a few seats at the expense of Pennsylvania and Wisconsin. Federal grant allocations might not be much affected either. Moreover, any attempt to make a statistical adjustment to the mechanical headcount would, by injecting judgmental factors . . . open the census process to charges of political manipulation. And while a statistical adjustment for the undercount would undoubtedly improve the accuracy of the nationwide census total, there is no consensus among statisticians and demographers that it would make the state and district census totals — the level at which the adjustment would actually affect representation and funding — more accurate.

Tucker, 958 F.2d at 1413 (citations omitted).

Subsequent to this decision, plaintiffs filed suit in the United States District Court for the Eastern District of Michigan arguing that defendants violated the Constitution by undercounting the population of the City of Detroit. In their complaint, plaintiffs alleged two reasons for this undercount. First, despite elaborate safeguards, the Census Bureau made certain enumeration errors

that were caused by circumstances peculiar to Detroit; and second, that the 1990 census undercounts minority populations generally and minority groups comprise a significant segment of Detroit's population. Plaintiffs sought a declaratory judgment that the official population of the City of Detroit for the 1990 decennial census, as reported by the Census Bureau, seriously underreported the actual population of the City of Detroit; that the Constitution and census laws require the Census Bureau to undertake affirmative efforts to correct the miscount and to make a statistical adjustment for the racially differential undercount or, alternatively, recount parts of the city door-to-door.

On August 14, 1992, the District Court granted the defendants' motion for summary judgment. The court found that plaintiffs lacked standing to challenge the undercount pursuant to this Court's ruling in *Young v. Klutznick*, 652 F.2d 617 (6th Cir.1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (1982); that plaintiffs failed to state a constitutional violation of a cognizable right; and that, in any event, plaintiffs had failed to demonstrate a genuine issue as to any material fact regarding the government's good-faith efforts to count the population of Detroit to the maximum extent practicable. This timely appeal followed.

II. Standard of Review

This Court reviews a District Court's grant of summary judgment *de novo*, making all reasonable inferences in favor of the non-moving party. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir.1990). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The inquiry is "whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

III. Standing

A. Dilution of Voting Power

The City of Detroit and Mayor Young do not assert that alleged errors in the census have caused Michigan to be underrepresented in the House of Representatives. Instead, plaintiffs claim that the City of Detroit has been disproportionately undercounted relative to other (predominately white) areas of the state because the Census Bureau certified an official population count that is not adjusted for the differential undercount of blacks. Consequently, when the federal court created voting districts for the State of Michigan based upon the unadjusted 1990 census figures, the voting strength of the Detroit residents, such as Mayor Young, was diluted.[4]

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4. As plaintiffs explain:

> [S]ince Michigan, with an officially reported population count of 9,295,297, is entitled to 16 seats in the House of Representatives, each congressional district within the State of Michigan should have approximately 580,956 persons. The officially reported population count of the City of Detroit is 1,027,974, so that, as reported, the City of Detroit would embrace 1.769 Congressional districts. If an adjustment for the racially differential undercount had been made in accordance with the figures derived from the [PES], Michigan's total population would be approximately 9,404,000. . . . With an adjusted

(Cont'd)

Appendix A

As a threshold matter, this Court must determine whether the plaintiffs have standing to challenge the conduct of the defendants. In order for plaintiffs to establish the requisite standing, they must demonstrate "at an irreducible minimum" (1) that they personally have suffered an "injury-in-fact;" (2) that the injury can be traced to the challenged conduct of the defendants (causation); and (3) that the injury is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, __ U.S. __, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

In *Young v. Klutznick*, 652 F.2d 617 (6th Cir.1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (1982), these same plaintiffs challenged the 1980 census alleging precisely the same injury (dilution of voting power and loss of federal funds due to the census undercount). Unlike the case at hand, however, the suit in *Klutznick* was brought prior to the redistricting of Michigan's representative districts. This Court concluded that the plaintiffs lacked standing because they failed to satisfy the causation element. The Court held that dilution of plaintiffs' voting power was not caused by the Census Bureau's differential undercounting of minorities, but rather by the redistricting decisions of the Michigan state legislature. Specifically, this Court

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> population count of 1,065,000 according to the [PES], instead of an official population count of 1,027,974, the City of Detroit would embrace 1.811 Congressional districts instead of 1.769. Thus, the use of the unadjusted official population count to determine Congressional representation within the State of Michigan means that the residents of the City of Detroit have proportionately less representation in the House of Representatives than the residents of all or virtually all of the other cities and sub-units in Michigan.

stated that "[i]f the Michigan legislature may adjust for the undercount, whether the injuries feared by plaintiffs do in fact arise does not depend upon defendants' actions. An independent third party, the Michigan state legislature, would play a necessary role in determining the effects of the census upon plaintiffs." *Id.* at 624. The Court went on to find that the state legislature was not constitutionally compelled to use the Bureau's census data.

Relying on *Klutznick*, the District Court found that the plaintiffs in this case likewise lacked standing because:

> [T]he Census Bureau neither creates state and federal legislative districts nor prescribes legislative spending. Those duties are reserved to the Michigan state legislature and Congress. Therefore, the conduct of intervening third parties, not the actions of the defendants, are directly responsible for plaintiffs' claimed injuries.

City of Detroit v. Franklin, 800 F.Supp. 539, 542 (E.D.Mich.1992). Plaintiffs attempt to distinguish this case from *Klutznick* on the ground that in *Klutznick* the Michigan legislature had not yet redistricted so it was uncertain whether the legislature would, in fact, rely on the census data. Here, however, it is undisputed that the federal court, which redistricted Michigan's representative districts after the 1990 census, relied upon the unadjusted census data. *Austin v. Good*, 800 F.Supp. 557 (E. & W.D.Mich.1992) (three-judge court). This court's decision in *Klutznick*, however, makes clear that if the Michigan legislature is not constitutionally compelled to use the Bureau's census data when redistricting, then its decision (whether to use the data or not) is an independent act breaking the chain of causation between the challenged actions of

the Census Bureau (undercounting and failing to adjust for the undercount) and the injury to the plaintiffs. Therefore, the dispositive issue for this Court is whether the Michigan legislature (or the federal court which acted in its place) is constitutionally compelled to use the unadjusted headcount reported by the Census Bureau.

In *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), the Supreme Court construed the Apportionment Clause of the Constitution as requiring "as nearly as is practicable one man's vote in a congressional election [to be] worth as much as another's." *Id.* at 8, 84 S.Ct. at 530. Over time, the Supreme Court has refined the "nearly as is practicable" standard of *Wesberry*. In *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31, 89 S.Ct. 1225, 1229, 22 L.Ed.2d 519 (1969), the Court held that this standard requires a "good faith effort to achieve precise mathematical equality." Then, in *Karcher v. Daggett*, 462 U.S. 725, 732, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), the Court "reaffirmed its dedication to the principle of exact mathematical equality [in determining the population of a state's electoral districts] and rejected the argument of the state of New Jersey that variations in population that are smaller than the margin of error embodied in the census figures should be regarded as de minimis." *Good*, 800 F.Supp. at 560.

In *Karcher*, the Supreme Court stated that "the census data provide the only reliable — albeit less than perfect — indication of the districts' 'real' relative population levels." *Id.* at 738, 103 S.Ct. at 2662. The Court further stated that "because the census count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality." *Id.* (citation omitted). We agree with the District Court's interpretation that:

> The Court in *Karcher* did not hold that the states must use census figures to reapportion congressional representation. The Supreme Court merely reiterated a well-established rule of constitutional law: states are required to use the "best census data available" or "the best population data available" in their attempts to effect proportionate political representation. Nothing in the constitution or *Karcher* compels the states or Congress to use only the unadjusted census figures. *Karcher* does not overrule *Young [v. Klutznick].*

City of Detroit, 800 F.Supp. at 543 (citation omitted). *See also Senate of State of California v. Mosbacher,* 968 F.2d 974, 979 (9th Cir.1992) ("If the State knows that the census data is underrepresentative, it can, and should, utilize noncensus data in addition to the official count in its redistricting process."); *Tucker,* 958 F.2d at 1419 ("Not only because population shifts over a ten-year period, but also because population and voting population are not the same, states are not required to use census figures for the apportionment of their legislatures") (citation omitted). If figures other than the census count are the best population data available, the Supreme Court did not, in *Karcher,* bar their use. Consequently, plaintiffs cannot premise standing on their underrepresentation claim.

B. Funding

Plaintiffs do, however, have standing to challenge the defendants' actions based upon their claim that the census undercount will result in a loss of federal funds to the city of Detroit. It is well established that when considering whether a

complaint provides the plaintiffs with standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here, plaintiffs allege that:

> The Congress has established numerous programs of grants-in-aid to states, cities and other sub-units that are based on the population of the states, cities, and sub-units, as contained in the official population count prepared and certified by the Bureau in connection with the decennial census and/or the mid-year census authorized under 13 U.S.C. sec. 141(d)(e). Such programs, under which the City of Detroit receives substantial amounts of federal funds, include Community Development Block Grants, Rental Housing Rehabilitation, Emergency Shelter grants, and Urban Mass Transit Capital and Operating Assistance. As a consequence, the amount of federal funds to be received by plaintiff, CITY OF DETROIT, in the years following the 1990 decennial census will be affected substantially by the official population count of the City of Detroit that is prepared and certified by the Bureau.

Joint App. at 11-12. Defendants argue, and the District Court found, that plaintiffs cannot premise standing on their claim that Detroit's access to federal funds will be impaired by the alleged undercount of the City's population because Congress is not required to allocate federal funds to states and localities on the basis of population. *FAIR v. Klutznick*, 486 F.Supp. 564, 569 n. 9 (D.D.C.1980).

It is undisputed, however, that many federal programs do disburse funds based upon population figures as reported in the decennial census. *See* 13 U.S.C. § 141(e)(1); *Tucker*, 958 F.2d at 1415 ("there is no doubt that, as a matter of fact, the allocation of state and federal funds is heavily influenced by census figures"). Consequently, several courts have reasoned that although "the Census Bureau and the Department of Commerce are not in charge of distribution of federal funds, the Bureau's actions significantly affect the distribution of funds and therefore satisfies the requirements for injury in fact." *State of Texas v. Mosbacher*, 783 F.Supp. 308 (S.D.Texas 1992). In *Carey v. Klutznick*, 637 F.2d 834 (2d Cir.1980), *rev'd on other grounds*, 653 F.2d 732 (2d Cir.1981), the city and mayor of New York challenged the manner in which the Census Bureau conducted the 1980 census in the State of New York, claiming the census had resulted in an under-count and a subsequent loss of federal funds. In conferring standing, the Second Circuit stated:

> We agree with the court in *City of Camden v. Plotkin*, 466 F.Supp. 44, 47-51 (D.N.J.1978), that citizens who challenge a census undercount on the basis, *inter alia*, that improper enumeration will result in loss of funds to their city have established both an injury fairly traceable to the Census Bureau and a substantial probability that court intervention will remedy the plaintiffs' injury. The present case is distinguishable from FAIR V. KLUTZNICK . . . , where no plaintiff alleged that his other own state or congressional district would benefit if the relief sought were granted. The individual plaintiffs in this case have alleged concrete

> harm in the form of dilution of their votes and decreased federal funds flowing to their city and state, thus establishing their standing.

Carey, 637 F.2d at 838. Similarly, in *City of Willacoochee, Ga. v. Baldrige,* 556 F.Supp. 551 (S.D.Ga.1983), the city and its mayor commenced an action challenging the accuracy of the population count of the city as reported in the 1980 decennial census. The plaintiffs claimed that the inaccurate population count would deprive them of their share of the proceeds of two federally-funded programs which distributed funds on the basis of population data. The District Court found that the city had established the necessary standing since the loss of federal funds due to an inaccurate population count "would be a distinct and palpable injury" to the city. *Id.* at 554. Additionally, in *State of Texas,* the District Court reasoned that:

> The State of Texas . . . has not asserted through its pleadings a direct injury and therefore, does not have standing as a recipient of federal funds. In *Carey* . . . , the State of New York alleged direct loss due to revenue sharing funds. Although citizens of Texas may suffer a direct injury because of this, the State of Texas will not suffer in this same direct way. Absent an allegation of a direct loss, the State does not show injury-in-fact. *The claimed loss of federal funding will only be actionable against the United States if it was brought by plaintiffs who could show an actual direct loss of funds due to an undercount.*

783 F.Supp. at 314 (footnotes omitted and emphasis added).

Appendix A

Taking the allegations of the complaint as true, plaintiffs have established that *they* were directly affected by the action of the defendants as that conduct affected *their* city and *their* funds. *See Ridge v. Verity,* 715 F.Supp. 1308, 1318 (W.D.Pa.1989).

IV. Census Methodology

Having found standing, this Court must next determine whether plaintiffs have stated a violation of any judicially enforceable constitutional right. Article I, § 2, cl. 3 requires that "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers," and that the "actual enumeration shall be made . . . within every subsequent Term of ten years, *in such Manner as [the Congress] shall be law direct.*" Plaintiffs come close to arguing that this provision creates a constitutional right to census accuracy. *See Senate State of California,* 968 F.2d at 978 ("The Senate argues that because the Constitution provides for a census based upon an 'actual Enumeration' of the people in this country, there is a right to an accurate count"); *Tucker,* 958 F.2d 1411 (court rejected argument that decisions mandating equality in legislative districts provide a constitutional foundation for good-faith disputes regarding the accuracy of the census count). Specifically, plaintiffs contend that the apportionment clause requires the Census Bureau to make a tabulation of the population of each state and of each city and sub-unit within a state that as accurately as possible includes all persons reasonably capable of being determined to reside therein.[5]

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5. Plaintiffs' argument is similar to that raised in *Tucker,* in which Illinois residents claimed that the Census Bureau violated the apportionment clause of the Constitution as that provision "implicitly command[s] the Bureau to make whatever adjustments in the raw census totals are necessary to make the census the best feasible estimate . . . of the American population." *Tucker,* 958 F.2d at 1415.

Appendix A

Plaintiffs do not claim that the Census Bureau deliberately set out to undercount the City of Detroit in the 1990 decennial census, but rather contend that the way in which the census was conducted in the city resulted in a substantial undercount of the residents of Detroit with its large minority and low income population. A similar argument was considered in *Tucker,* wherein the Seventh Circuit dealt with an attempt by plaintiff residents to force the Secretary of Commerce to adjust the census data for much the same reasons as those asserted here. In finding judicial review improper, the court said:

> It might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard. There is nothing of that sort, and the inference is that these enactments do not create justiciable rights. The Constitution directs Congress to conduct a decennial census, and the implementing statutes delegate this authority to the Census Bureau. There is little more to the statutes they specify a timeable, and a procedure for translating fractional into whole seats — but they say nothing about how to conduct a census or what to do about undercounts. So nondirective are the relevant statutes that is arguable that there is no law for a court to apply in a case like this — that you might as well turn it over to a panel of statisticians and political scientists and let

> them make the decision, for all that a court could do to add to its rationality or fairness.

Id. at 1417-18 (citations omitted).

The Constitution directs Congress to conduct a decennial census in such manner as they shall by law direct. Congress in turn has delegated this task to the Secretary of Commerce "in such form and content as he may determine." 13 U.S.C. § 141(a). Despite this deferential language, it is clear that if Congress or the Census Bureau failed (altogether) to conduct a decennial census or failed to conduct a good-faith enumeration, or intentionally reduced some group's representation or funding, these claims would be reviewable by a federal court. However, we agree that "merely by directing congressional apportionment in accordance with the decennial census, Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." *Tucker,* 958 F.2d at 1418.

This is especially true in a case like this, where the Census Bureau's efforts to conduct as accurate a census count as possible are extraordinary. According to one court, the 1990 census is said to be one of the best ever taken in this country because despite our large population, approximately 98 percent of the population was counted. *Senate of the State of California,* 968 F.2d at 979. Unfortunately, the errors were not distributed proportionately (*i.e.*, larger numbers of minorities were missed than whites). After reviewing the record, it is difficult to envision (at least with respect to the City of Detroit) what more the Census Bureau could have done to further eradicate these errors.

Plaintiffs, however, point to several alleged deficiencies in the Census Bureau's procedures. For example, plaintiffs contend that

because the Census Bureau based its address control file ("ACF") on an address list it purchased from a commercial vendor, it did not make a good-faith effort to count, as nearly as practicable, all Detroit residents, for many low income people would not appear on such a list. Second, plaintiffs contend that the APOC failed to account for substantial pockets of low income people, because the post office allegedly does not deliver mail to a number of areas in Detroit. Plaintiffs contend that the accuracy and incompleteness of the ACF is demonstrated in part by a telephone survey conducted by Michigan Consolidated Gas Company ("MichCon") which allegedly identified a number of areas in the City of Detroit where people were living but did not receive census forms because their addresses were not on the ACF. As a result, plaintiffs argue that the Secretary should conduct a new door-to-door census of every building in certain parts of Detroit to see if there is anyone who was not counted. The fundamental problem with plaintiffs' argument is that MichCon took the survey before the Census Bureau had completed the census. As the District Court found:

> [T]he Census Bureau did not finish counting Detroit residents for several months after MichCon made its telephone survey. The Census Bureau still had not finished the Nonresponse Follow-Up. . . . Nor had the Census Bureau completed the "Were You Counted?" campaign. . . . Nor had the Census Bureau conducted the Housing Coverage Check. . . . Finally, the Census Bureau had still not undertaken the Post census Local Review. . . .

City of Detroit, 800 F.Supp. at 545. Accordingly, we find that

plaintiffs have failed to put forth evidence creating any genuine issues of material fact. Despite plaintiffs' self-serving contentions to the contrary, it is clear that defendants have counted the residents of the City of Detroit as accurately as possible. The Census Bureau has not undertaken a door-to-door campaign since the 1960 census and plaintiffs have presented no evidence indicating that such an effort would lead to any more accurate results. Plaintiffs cannot seriously be arguing that a perfectly accurate count of upwards of 250 million people (or nine-plus million in Michigan) was feasible, and nothing in the Constitution compels such an accurate result.

V. Failure to Adjust for the Undercount

Plaintiffs' final argument is that, at the very least, a genuine issue of material fact exists as to whether, within the state of Michigan, an adjustment for the racially differential undercount would produce an official population count that, on balance, would be more accurate than an official population count based on the raw unadjusted data alone. Plaintiffs describe this statistical adjustment claim as the "Michigan version" of the national statistical claim litigated in *City of New York v. United States Department of Commerce*, 739 F.Supp. 761 (E.D.N.Y.1990). Just recently, the court in *City of New York* upheld the Secretary's decision not to adjust the census data, finding that this decision did not violate the Administrative Procedure Act, the Constitution, any statute, or the stipulation previously agreed to by the parties to the litigation. *City of New York v. United States Department of Commerce*, 822 F.Supp. 906 (E.D.N.Y.1993).

The court framed the question for review as "whether for Secretary's application of the decision guidelines as construed in light of constitutional requirements, to reject the [adjusted] counts

is arbitrary and capricious." *Id.* at 919.[6] The court recognized that "[t]he conclusion that the Secretary must provide the most accurate census practicable . . . does not lead inexorably to the conclusion that a decision against adjustment is therefore unconstitutional." *Id.* After reviewing the Secretary's consideration of the applicable guidelines, the court found that the decision not to adjust was not arbitrary and capricious.

Throughout his decision not to adjust, the Secretary explained that while the adjustment methodology was relatively successful in reflecting the total national population in absolute numbers, it was seriously flawed in portraying the distribution of the population among the states and localities. The Secretary concluded that there was simply not enough convincing evidence to support a finding that the adjusted counts would lead to greater distributive accuracy than the census counts. As the Secretary stated, "[w]hile we know that some will fare better and some will fare worse under an adjustment, we don't really know how much better or how much worse." Additionally, the Secretary's decision also forecloses plaintiffs' argument that an adjustment could be made for the population of Michigan alone.[7] As the District Court concluded:

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6. The court distinguished its case from *Franklin v. Massachusetts*, __U.S.__, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), wherein the Supreme Court held that the Secretary's acts in conducting the census and reporting the counts to the President were not "final" for purposes of challenging apportionment, because the Secretary simply reports the results to the President, who in turn transmits the apportionment for each state in the House of Representatives to the Clerk of the House. The *City of New York* case, however, likely the case at bar, involved a challenge to the counts as used for intra-state redistricting and federal fund allocation, neither of which requires the Secretary to transmit the counts to the President. Thus, the Secretary's reporting of the counts for these purposes is a final agency action.

7. In its decision, the Secretary points out that:

(Cont'd)

> In the same way that a national adjustment would create winners and losers, so too would a statewide statistical adjustment. The Secretary's statements make clear that a statistical adjustment would cause a mere shifting of unavoidable inequities and not a net improvement in accuracy. Plaintiffs have failed to provide any evidence to the contrary.

City of Detroit, 800 F.Supp. at 547. Plaintiffs' request for a statistical adjustment for Michigan alone cannot be considered in isolation. It would be impractical for this Court to order (the Secretary to do) such an adjustment without considering the consequences for the other states and other cities. Thus, what plaintiffs' request really comes down to is a nationwide adjustment, the prospect of which has already been rejected. *City of New York,* 822 F.Supp. 906.

This is another case in which "[t]he plaintiffs' claim to a

(Cont'd)

> In attempting to make the actual count more accurate by an adjustment, we might be making the shares less accurate. The shares are very important because they determine how many congressional seats each state gets, how political representation is allocated within states, and how large a "slice of the pie" of federal funds goes to each city and state. Any upward adjustment of one share necessarily means a downward adjustment of another. Because there is a loser for every winner, we need solid ground to stand on in making any changes. I do not find solid enough ground to proceed with an adjustment.

Adjustment Decision, 56 Fed.Reg. 33,582, (July 22, 1991).

census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." *Tucker,* 958 F.2d at 1418. This the Court declines to do.

VI.

Accordingly, the order of the District Court granting defendants' motion for summary judgement is AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, E.D. MICHIGAN, S.D. DATED AUGUST 14, 1992

CITY OF DETROIT V. FRANKLIN
Cite as 800 F. Supp. 539 (E.D. Mich 1992)

CITY OF DETROIT, a municipal corporation, and Coleman A. Young, individually and as Mayor, City of Detroit,

Plaintiffs,

v.

Barbara H. FRANKLIN, Secretary of Commerce of the United States, and Barbara Bryant, Director of the United States Bureau of the Census,

Defendants.

No. 91-CV-73672-DT

United States District Court,
E.D. Michigan, S.D.

Aug. 14, 1992.

David M. Glass, Dept. of Justice, Washington, D.C., for plaintiffs.

Ulysses W. Boykin, Detroit, Robert A. Sedler, Wayne State University, Law School, Detroit, for defendants.

Appendix B

MEMORANDUM OPINION AND ORDER

ZATKOFF, District Judge.

In this suit challenging the results of the 1990 decennial census, the Court grants the defendants' motions for summary judgment for three independent reasons. First, the plaintiffs lack standing to sue because there is no causal link between their claimed injuries and the challenged conduct. Second, the plaintiffs lack standing to sue because they fail to cite any constitutional right for the violation of which the Court may grant a remedy. Third, even if the plaintiffs could overcome the first two hurdles, they fail to cite enough evidence under Rule 56 of the Federal Rules of Civil Procedure to support their claim.

I. FACTS

Plaintiffs, the City of Detroit and its mayor, Coleman A. Young, bring this suit against the Secretary of Commerce and the Director of the United States Bureau of the Census (collectively: the Census Bureau), alleging that the Census Bureau violated Article I, section 2, clause 3 of the United States Constitution (the apportionment clause) by failing "to conduct the most accurate census that it is reasonably possible to conduct." Plaintiffs' Response to Defendants' Motions for Summary Judgment (Plaintiffs' Response), at 20. Plaintiffs claim that the Census Bureau's alleged constitutional violation has caused them to lose representation in the House of Representatives and a fair share of federal and state funds allocated on the basis of the census figures. In Count I of their complaint (the undercount claim), plaintiffs allege that the Census Bureau's counting methods failed to account for significant numbers of Detroit residents. Hence, they ask the

Court to order the Census Bureau to develop a plan to correct the alleged undercount. In Count II (the statistical adjustment claim), plaintiffs say that the Census Bureau's allegedly flawed methods failed to account for a higher rate of blacks than of whites. Accordingly, they ask the Court to order the Census Bureau to adjust the population count throughout the state of Michigan to correct the disproportionate undercount of blacks.

The Census Bureau moves for summary judgment as to each count of plaintiffs' complaint. Plaintiffs filed response briefs, to which defendants replied. In addition, the Court ordered plaintiffs and defendants to file supplemental briefs, and allowed defendants, as movants, to file a final supplemental reply brief. Pursuant to E.D. Mich. Local R. 7.1(e)(2), the Court orders that the motions be submitted and determined on the briefs without oral argument.

With regard to the undercount claim, the Census Bureau seeks summary judgment on two grounds, each of which implicate issues of standing. First, it asserts that plaintiffs do not have standing to bring this suit because they fail to cite sufficient evidence showing a fairly traceable causal connection between their alleged injuries and the Census Bureau's counting methods. Second, the Census Bureau asserts that, if the Court orders it to recount the population of Detroit, the Court would also have to order it to recount the population of the entire United States so as not to prejudice other states and units of local government, for any increase in the number of Michigan's seats in the House of Representatives would come at the expense of some other state, and any increase in federal funding for Detroit would come at the expense of other states and units of local government. Therefore, the Census Bureau argues that the Court must deny the injunctive relief plaintiffs seek — a recount — because such relief is so unrealistic that it defeats standing to litigate the case on the merits.

Appendix B

With regard to the statistical adjustment claim, the Census Bureau claims that the Court should grant summary judgment against plaintiffs for two reasons. First, the Census Bureau argues that plaintiffs simply fail to cite any constitutional right for the violation of which the federal courts may grant a remedy. Second, it asserts that, even if the Court holds that plaintiffs have identified some judically enforceable federal right, the undisputed facts show that the Census Bureau's decision not to make a statistical adjustment to the population count was not arbitrary and capricious.

Although the parties treat each count of plaintiffs' complaint as a separate claim, the Court notes that plaintiffs assert a single constitutional claim, yet seek two different forms of relief. Plaintiffs allege a violation of the apportionment clause, and ask the Court to order the Census Bureau to correct the violation, either by recounting or by statistically adjusting the population count.[1] Accordingly, the various parts of the Court's analysis focus on, and apply equally to, the single alleged constitutional claim.

II. STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); Fed.R.Civ.P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element

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1. Although it appears that plaintiffs ask the Court to order both a recount and a statistical adjustment, either form of relief, if granted, would redress the alleged injuries of underfunding and political under-representation.

essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *United States v. Diebold,* 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Cook v. Providence Hosp.,* 820 F.2d 176, 179 (6th Cir. 1987); *Smith v. Hudson,* 600 F.2d 60 (6th Cir. 1979), *cert. dismissed,* 444 U.S. 986, 100 S.Ct. 495, 62 L.Ed.2d 415 (1979).

III. DISCUSSION

Initially, the Court notes that plaintiffs do not contend that the Census Bureau set out to undercount Detroit residents or blacks or the poor or any identifiable group. Rather, they merely allege that the Census Bureau unintentionally undercounted poor people, a group which holds a disproportionate number of blacks, throughout the United States. Indeed, plaintiffs' claim for relief rest solely on the apportionment clause, U.S. Const. Art. I, § 2, cl. 3. Plaintiffs' Response, at 8-9.

The apportionment clause of the original constitution reads as follows:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . and excluding Indians not

> taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

The fourteenth amendment later changed the first sentence of the apportionment clause to read as follows:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

U.S. Const. Amend. XIV, § 2.

Plaintiffs assert that the apportionment clause, as amended, confers on them a right to seek judicial review of the Census Bureau's statistical methodology. In support of their argument, plaintiffs note that in *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 84 S.Ct. 526, 529-30, 11 L.Ed.2d 481 (1964), a congressional reapportionment case, the Supreme Court held that the apportionment clause "means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Plaintiffs also cite a number of later congressional reapportionment cases which hold that the "as nearly as practicable" standard announced in *Wesberry* requires a state to make a " 'good-faith effort to achieve precise mathematical equality' " in determining the population of its electoral districts, so as to ensure equal voting power for every voter. *Karcher v. Daggett*, 462 U.S. 725, 730, 103 S.Ct. 2653, 2658, 77 L.Ed.2d 133

(1983) (quoting *Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31, 89 S.Ct. 1225, 1228-29, 22 L.Ed.2d 519 (1969)). Plaintiffs then assert that the "one man, one vote" principle which the Supreme Court found implicit in the apportionment clause applies equally to the Census Bureau, requiring it to count, as nearly as practicable, all persons. Thus, plaintiffs argue, because the Census Bureau concedes that it undercounted the entire population, and that it undercounted a higher percentage of poor people than others, it violated the "one man, one vote" principle.

A. STANDING TO SUE

As a threshold matter, plaintiffs must establish standing to sue. Principles of standing derive from constitutional requirements and prudential considerations.

The constitutional requirements stem from Article III of the Constitution, which reads as follows: "[t]he judicial Power shall extend to . . . Cases . . . [and] Controversies. . . ." U.S. Const. Art. III, § 2. Standing requirements ensure that the case at issue "will be presented in an adversary context and in a form historically capable of judicial resolution." *Young v. Klutznick,* 652 F.2d 617, 623, (6th Cir. 1981), *cert. denied,* 455 U.S. 939, 102 S.Ct. 1430, 71 L.Ed.2d 650 (1982) (quoting *Flast v. Cohen,* 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968)). In this way, federal courts are insulated from "ill-defined controversies over constitutional issues" and hypothetical or abstract cases. *Young,* 652 F.2d at 623 (citations omitted).

Self-imposed judicial restraints supplement constitutional standing requirements. These restraints apply when "prudential considerations militate against invocation of the judicial process." *Id.* To establish standing a plaintiff must also show a fairly

traceable causal nexus between the claimed injury and the challenged conduct, and the existence of a remedy for redress of the claimed injury. *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 72-73, 98 S.Ct. 2620, 2629-30, 57 L.Ed.2d 595 (1978).

In sum, under Article III and *Duke Power,* to establish standing a plaintiff must identify and prove a real injury, its cause, and an available and workable judicial remedy. Plaintiffs have failed to meet their burden in two ways.

1. Lack of Causal Nexus

First, plaintiffs lack standing to sue because they cannot establish a causal connection between their claimed injuries and defendants' conduct. Plaintiffs argue that their injuries — political under-representation and underfunding — flow from the Census Bureau's allegedly faulty methodologies and refusal to adjust statistically the population count. The Court notes, however, that the Census Bureau neither creates state and federal legislative districts nor prescribes legislative spending. Those duties are reserved to the Michigan state legislature and Congress. Therefore, the conduct of intervening third parties, not the actions of the defendants, are directly responsible for plaintiffs' claimed injuries.

The Sixth Circuit reached a similar conclusion in *Young.* In *Young,* the plaintiffs asserted an almost identical constitutional claim against the Census Bureau in relation to the 1980 decennial census. The court found, among other things, that "[i]f the Michigan legislature may adjust for the undercount, whether the injuries feared by plaintiffs do in fact arise does not depend upon defendants' actions." 652 F.2d at 624. The court further found that

"[a]n independent third party, the Michigan state legislature, would play a necessary role in determining the effects of the census upon the plaintiffs." *Id.* The same is true here. Plaintiffs' claimed injury relating to political under-representation results not from the Census Bureau's alleged undercount, but rather from the failure of the Michigan state legislature to adjust the census numbers for purposes of apportionment. In the same way, plaintiffs' claimed injury relating to underfunding flows not from the Census Bureau's actions, but rather from the refusal of both the Michigan state legislature and Congress to adjust the census count when allocating and spending public funds.[2]

Perhaps the Court would reach a different conclusion if both the Michigan state legislature and Congress were obligated to accept unadjusted census figures, but they are not. *See Young,* 652 F.2d at 624 ("There is no reason to believe that states would not be free to adjust census figures for redistricting in the census year, as long as the adjustment is 'thoroughly documented' and applied in a 'systematic' manner." (citations omitted)); *see also* 1990 Department of Commerce Information Bulletin (unrebutted Exhibit A to Defendants' Supplemental Brief) (federal grant programs do not necessary rely on specific census data).

Plaintiffs attempt to overcome their standing deficiency by arguing that *Young's* causation analysis has been rejected by the Supreme Court. Specifically, plaintiffs argue that the Supreme Court in *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 77

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2. The Court does not mean to suggest that it believes Congress and/or the Michigan state legislature should or must adjust Census figures, or that the plaintiffs have a viable or reasonable claim against another defendant or defendants. The Court raises the point only to demonstrate the lack of a causal connection between the claimed injuries and the defendants' conduct.

L.Ed.2d 133 (1983), held that the apportionment clause imposes an obligation on states to use only the official population count as determined by the Census Bureau in reapportioning congressional representation within a state. Plaintiffs suggest that *Karcher* effectively overrules *Young* on the issue of causation.

Plaintiffs misconstrue the import of *Karcher*. The holding in *Karcher* is much broader than suggested by plaintiffs. The Court in *Karcher* did not hold that the states must use census figures to reapportion congressional representation. The Supreme Court merely reiterated a well-established rule of constitutional law: states are required to use the "best census data available" or "the best population data available" in their attempts to effect proportionate political representation. 462 U.S. at 731, 103 S.Ct. at 2659 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 528, 89 S.Ct. 1225, 1227, 22 L.Ed.2d 519 (1969)). Nothing in the constitution or *Karcher* compels the states or Congress to use only unadjusted census figures. *Karcher* does not overrule *Young*.

2. Lack of Judicially Manageable Remedy

Plaintiffs also lack standing to sue because they fail to cite any constitutional right for the violation of which the Court may fashion a remedy. As the court recognized in *Tucker v. Department of Commerce*, 958 F.2d 1411, 1418 (7th Cir. 1992), a case nearly identical to this one, the apportionment clause simply directs congressional apportionment in accordance with the census. Nothing in the apportionment clause suggests that a person may bring a lawsuit challenging the methods by which the population is counted. Moreover, the reapportionment cases merely authorize the federal courts to review the methods used by a state to divide its population into electoral districts, "so far as that is necessary to assure equal voting power to every voter." *Id.* While the federal

courts can use the standard of equality to review the methods a state uses to divide its population into electoral districts, neither the constitution nor Congress suggests a standard with which to review the Census Bureau's statistical methodology. The constitution directs Congress to conduct the census; Congress has delegated the task to the Secretary of Commerce, "in such form and content as he may determine, including the use of sampling procedures and special surveys," 13 U.S.C. § 141(a); and the Census Bureau, an agency within the Department of Commerce, has been entrusted with the duty of taking the census. The implementing statutes fail to provide the Census Bureau with any guidelines on how to take the census.

The absence of any judicially administrable standard prompted the court in *Tucker* to note that the plaintiffs in that case merely asked the court to take sides in a dispute among statisticians and demographers. The court concluded that the plaintiffs lacked standing because "a case about statistical methodology is a case whose gears fail to mesh with any judicially enforceable rights." 958 F.2d at 1419. The Court agrees with the reasoning of *Tucker.* Accordingly, the Court holds that plaintiffs simply fail to cite any constitutional right for the violation of which the federal courts may shape a remedy. *Cf. Young,* 652 F.2d at 625 n. 8 ("there are many unjust conditions and occurrences, natural and man-made, which federal courts do not have the strength, wisdom or power to remedy in a timely manner").

B. FAILURE TO PROVE CONSTITUTIONAL VIOLATION

Furthermore, even if the Court accepted plaintiffs' argument that the apportionment clause gives them a right to challenge the Census Bureau's statistical methodology, the Court would nonetheless grant summary judgment for the Census Bureau. As

noted, the reapportionment cases hold that the apportionment clause requires a state to divide its population so that, as nearly as practicable, every voter in a congressional election is assured equal voting power. *Wesberry*, 376 U.S. at 7-8, 84 S.Ct. at 529-30. Just as the reapportionment cases direct the federal courts to determine whether a state made a good-faith effort to achieve precise mathematical equality in determining the population of its electoral districts, plaintiffs ask the Court to determine whether the Census Bureau made a good-faith effort to count, as nearly as practicable, all Detroiters. *See Cuomo v. Baldridge*, 674 F.Supp. 1089, 1093 (S.D.N.Y. 1987) (the question presented in a constitutional challenge to an inaccurate census is whether the Census Bureau "develop[ed] and implement[ed] procedures which were reasonably designed to count as nearly as practicable all those persons residing in the United States on Census Day"). The undisputed facts show that the Census Bureau did just that.

In its motions for summary judgment, the Census Bureau details the procedures it used in conducting the census. The Census Bureau asserts that, by using a variety of procedures, it sought to count as many people as reasonably possible. Although a particular method might not account for everyone, or even for an entire group of people, the Census Bureau asserts that it designed other methods to account for those persons missed. It asserts that its many procedures created "layers of redundancy," whereby persons missed by one method would be counted using one or more other methods. After describing at length the procedures used in taking the 1990 census, the Census Bureau asserts that plaintiffs cannot cite enough evidence to support their claim that the Census Bureau did not make a good-faith effort to count, as nearly as practicable, all Detroiters. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986) (a defendant seeking summary judgment satisfies its initial burden by

adequately showing why it believes the plaintiff cannot establish an essential element of its prima facie case).

In response to the Census Bureau's motions for summary judgment, plaintiffs point to three alleged deficiencies in the Census Bureau's procedures. First, plaintiffs contend that because the Census Bureau based its address control file (ACF) on an address list it purchased from a commercial vendor, it did not make a good faith effort to count, as nearly as practicable, all Detroit residents, for many low income people likely would not appear on such a list. Second, plaintiffs contend that one of the procedures used by the Census Bureau to update and refine the ACF, the Advance Post Office Check (APOC), failed to account for substantial pockets of low income people, because the post office allegedly does not deliver mail to a number of areas in Detroit. Third, plaintiffs assert that the Census Bureau's decision not to make a statistical adjustment to the population of the entire United States — to try to account for people missed by census takers, and especially to correct the racially disproportionate undercount — shows that the Census Bureau did not undertake a good faith effort to account for all Detroiters. Although plaintiffs allege in their complaint that the Census Bureau's methods contained several other flaws, they cite no evidence supporting those allegations. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986) (once a defendant seeking summary judgment satisfies its initial burden by adequately showing why it believes the plaintiff cannot establish an essential element of its prima facie case, the burden shifts to the plaintiff to show that its evidence is sufficient to establish the element).

To support their allegation that the ACF suffered from severe defects, because the Census Bureau based the ACF on a list it bought from a commercial vendor and because the APOC failed to

account for all low income Detroit residents, plaintiffs make a number of promises to produce evidence at trial, *see* Plaintiffs' Response, at 23 ("defendants will have the opportunity to refute each of [plaintiffs'] allegations at the trial, *after the plaintiffs have presented their evidence.* It is at that time and at that time only that this Court can decide how 'speculative' the plaintiffs [sic] claim that a serious 'miscount' occurred in the City of Detroit really is"), at 25 ("it is the contention of the plaintiffs, which they will prove at trial, that the 'layers of redundancy' were not effective"). and at 26 ("plaintiffs will identify [areas where mail is not delivered] at the trial the case and that they do in fact exist"); yet, plaintiffs cite only the results of a single telephone survey conducted by the Michigan Consolidated Gas Company the MichCon survey), and several drawings based on those results. Plaintiffs' evidence is simply insufficient to support their claim that the Census Bureau breached its duty under the apportionment clause to conduct in good faith an accurate count of Detroit residents.

Plaintiffs contend that the MichCon survey "identified a number of areas in the City of Detroit, where people were living (since they were customers of Michigan Consolidated Gas Company), but did not receive census forms, because their address were not on the [ACF] . . . ." Plaintiffs' Response, at 27. Even if the Court accepts the MichCon survey's results as an accurate picture of the number of Detroiters counted by the Census Bureau at the time MichCon took the survey, notwithstanding plaintiffs' failure to offer much more than the raw statistics which MichCon collected, the survey nonetheless fails to establish that the Census Bureau under-counted Detroiters, because MichCon took the survey before the Census Bureau had completed the census. Indeed, the Census bureau did not finish counting Detroit residents for several months after MichCon made its telephone survey. The Census Bureau still had not finished the Nonresponse Follow-Up,

a procedure in which census takers first visited or telephoned up to six times housing units that had not yet returned completed questionnaires, and then tried to obtain information from neighbors or building managers. Nor had the Census Bureau completed the "Were You Counted?" campaign, in which the Census Bureau asked units of local government, the media, and community-based organizations to encourage those who thought the Census Bureau had not counted them to call toll-free telephone numbers or to report data their household on forms printed in the newspapers. Nor had the Census Bureau conducted the Housing Coverage Check, in which the Census Bureau ran a computer search of the data it had collected, and compared the results with data obtained in the 1980 census and with recent population estimates, to determine whether the count of any communities or census blocks appeared low. Finally, the Census bureau had still not undertaken the Post census Local Review, where-by the Census Bureau gave units of local government updated maps of the census blocks in their communities and a chance to challenge the count of any housing unit or block. In short, plaintiffs simply cite no evidence which shows that the people surveyed by MichCon were not counted later. The sparsity and timing of the MichCon survey virtually destroy its probative value and render it a mere scintilla of evidence, speculative at best, in support of plaintiffs' argument. Accordingly, under Rule 56 of the Federal Rules of Civil Procedure, the MichCon survey fails to support plaintiffs' claim that the Census Bureau breached its duty under the apportionment clause to conduct in good faith an accurate count of Detroit residents.

Finally, plaintiffs quarrel with the Census bureau's decision not to make a statistical adjustment to the population of the entire United States to try to account for people missed by the census takers, and especially to try to correct the racially disproportionate

undercount. In support of their contention that the Census Bureau breached its duty under the apportionment clause to make a good-faith effort to count all Detroiters, as nearly as practicable, plaintiffs promise that "[a]t the trial of the present case, [they] will demonstrate that beyond question, within the State of Michigan, an adjustment for the racially differential undercount will produce an official population count which . . . is 'closer to the truth' than an official population count based on the raw unadjusted census data alone." Plaintiffs' Response, at 43-44. Plaintiffs also promise that "expert witnesses will testify that this result would obtain under *any* method of adjustment. . . ." *Id.* at 44. Yet, plaintiffs neglect to say how they will show that a statistical adjustment produces a more accurate census count. Further, they fail to identify the expert witnesses who will say that "*any*" statistical adjustment will produce a better count. Hence, plaintiffs' promises to offer enough evidence later appear empty. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986) (a plaintiff seeking to avoid summary judgment bears the burden of coming forward with evidence in support of its claim).

It seems from a careful reading of Plaintiffs' Response that, in opposing the Census Bureau's motion, plaintiffs rely primarily on statements made by the Secretary of Commerce (the Secretary). *See* Plaintiffs' Response, at 42. In deciding not to make a statistical adjustment to the population count of the entire United States, the Secretary made the following statement.

> Based on the measurements so far completed, the Census Bureau estimated that the proportional share of about 29 states would be made more accurate and about 21 states would be made less accurate by adjustment. Looking at cities, the census appears more

> accurate in 11 of 23 metropolitan areas with 500,000 or more persons[.] . . . . While these analyses indicate that more people live in jurisdictions where the adjusted counts appear more accurate, one third of the population lives in areas where the census appears more accurate. As the population units get smaller, including small and medium sized cities, the adjusted figures become increasingly unreliable. When the Census Bureau made allowances for plausible estimates of factors not yet measured, these comparisons shifted toward favoring the accuracy of the census enumeration. Using this test, 28 or 29 states were estimated to be made less accurate if the adjustment were to be used.
>
> What all these tests show, and no one disputes is that the adjusted figures for some localities will be an improvement and for others the census counts will be better. While we know that some will fare better and some will fare worse under an adjustment, we don't really know how much better or how much worse. If the scientists cannot agree on these issues, how can we expect the losing cities and states as well as the American public to accept this change?

Secretary's Decision § 1, at 1-4 to 1-5. Plaintiffs contend that the Census Bureau breached its duty under the apportionment clause to conduct in good faith an accurate count of Detroit residents, because the Census Bureau did not specifically consider adjusting

the population of Michigan alone, as opposed to the entire United States. Plaintiffs' Response, at 41-42.

Yet, plaintiffs misread the Secretary's decision. The Secretary's decision expressly rejects plaintiffs' contention.

> [I]n attempting to make the actual count more accurate by an adjustment, we might be making the shares less accurate. The shares are very important because they determine how many congressional seats each state gets, how political representation is allocated within states, and how large a "slice of the pie" of federal funds goes to each city and state. Any upward adjustment of one share necessarily means a downward adjustment of another. Because there is a loser for every winner, we need solid ground to stand on in making any changes. I do not find solid enough ground to proceed with an adjustment.

Secretary's Decision § 1, at 1-3 to 1-4.[3]

The evidence in the record indicates overwhelmingly that the Secretary's refusal to make a nationwide or statewide statistical

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3. The Secretary's decision discusses the likely effect the census figures will have on reapportionment and funding. In this respect, the Secretary's observations are rooted in history, not law. The decision does not recite or suggest a rule that the Michigan state legislature and/or Congress may not adjust census figures before allocating funds or carving legislative districts. As previously noted in this opinion, although the Michigan state legislature and Congress *may* and often do rely on census figures, they are not *required* to do so under existing law.

adjustment does not support plaintiffs' claims that the Census Bureau breached a constitutional duty to make a good faith effort to count everyone, including Detroit residents, and nearly as is practicable. In the same way that a national adjustment would create winners and losers, so too would a statewide statistical adjustment. The Secretary's statements make clear that a statistical adjustment would cause a mere shifting of unavoidable inequities and not a net improvement in accuracy. Plaintiffs have failed to produce any evidence to the contrary.

IV. CONCLUSION

For all of the foregoing reasons, the Court concludes that no genuine issues of material fact exist and that defendants are entitled to judgment as a matter of law. Accordingly, defendants' motion for summary judgment are GRANTED.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
FEB 15 1994
OFFICE OF THE CLERK

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No. 93-941

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF DETROIT, ET AL., PETITIONERS

v.

RONALD H. BROWN, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether the lower courts properly dismissed petitioners' claim that undercounts in the 1990 decennial census violated the Apportionment Clause of the Constitution, Art. I, § 2, Cl. 3.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-941

CITY OF DETROIT, ET AL., PETITIONERS

v.

RONALD H. BROWN, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 4 F.3d 1367. The opinion of the district court (Pet. App. 26a-44a) is reported at 800 F. Supp. 539.

JURISDICTION

The judgment of the court of appeals was issued on September 22, 1993. The petition for a writ of certiorari was filed on December 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I, § 2, Cl. 3, of the Constitution requires Congress to conduct a decennial census for the purpose of determining the number of Representatives to which each State is entitled in the United States House of Representatives. That Clause provides that the "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

The statutory implementation of that process appears in Title 13 and in 2 U.S.C. 2a. Pursuant to Title 13, the Secretary must complete and report to the President a "tabulation of total population by States" for the purpose of apportionment of congressional seats within nine months after the census date. 13 U.S.C. 141(b). The statute does not set forth detailed methodological requirements, but instead vests discretion in the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). After the census has been completed, and within a week after the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). Finally, within 15 days of the receipt of the statement, the Clerk of the

House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under [2 U.S.C. 2a]." 2 U.S.C. 2a(b). See generally *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992); *Department of Commerce* v. *Montana*, 112 S. Ct. 1415 (1992).

2. The "actual Enumeration" required by the Constitution always has been made through an actual count of individuals, rather than statistical estimations, even though there have been concerns about undercounts from the time of the first census in 1790. See *Carey* v. *Klutznick*, 653 F.2d 732, 735 (2d Cir. 1981), cert. denied, 455 U.S. 999 (1982). In connection with the 1980 and 1990 censuses, the Census Bureau[1] has considered proposals to adjust the actual headcount statistically. Both the 1980 and 1990 censuses have spawned considerable litigation by States (and their localities and citizens) that have believed that they would fare better if the headcount were adjusted statistically to compensate for the undercount.[2] In 1987, the Commerce Department decided that it would not make a statistical adjustment to the 1990 census headcount. In July of 1989, however, the Department agreed to vacate that decision in a stipulation in an action brought by New York and other parties in the United States District Court for the Eastern District of New York. See *City of New York* v. *Department of Commerce*, 739 F. Supp. 761, 763 (1990). In the stipulation, the Department agreed to undertake de novo consideration of the adjustment question, and to issue a final decision no later than July 15, 1991. *Id.* at 769. While

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[1] The Census Bureau is "an agency within, and under the jurisdiction of, the Department of Commerce." 13 U.S.C. 2.

[2] See *Carey*, 653 F.2d at 735 n.19 (citing 49 cases seeking adjustments to the 1980 census).

that reconsideration took place, the Executive Branch complied with the statutory mandate of the Census Act: the census count was completed, and the President transmitted the census results to Congress within the time limitations set forth in 2 U.S.C. 2a(a). As required by 2 U.S.C. 2a(b), the Clerk of the House certified to each State the number of Representatives to which it is entitled under those figures.

On July 15, 1991, the Secretary determined that the census headcount should not be adjusted on the basis of a statistical methodology. 56 Fed. Reg. 33,582. The Secretary recognized the existence of undercounts in the census tabulation, but concluded that it was unclear that adjusting the headcount would improve the accuracy of the census and that adjustment might introduce new distortions as well as new fears of political manipulation. *Id.* at 33,582-33,583.

The Secretary explained that the Census Bureau had conducted an intensive investigation into an adjustment technique that relied primarily on a process known as dual system estimation. In that process, the Secretary conducted a post-census sample survey—the post-enumeration survey (PES)—of approximately 170,000 housing units in 12,000 blocks across the nation, representing about one-sixth of one percent of the population of the United States. The blocks were selected to ensure that they included representatives of 1392 population subgroups known as "post-strata," designed to reflect all of the various demographic components of the nation's population. The information gathered from the PES was obtained during the census for the relevant blocks. By comparing the data, an adjustment factor was developed for each post-stratum that reflects the percent by which the PES indicated that the census overcounted or undercounted the population in that post-stratum. An

adjustment would have been accomplished by multiplying the number of people from each post-stratum that the census located in each of the almost 5,000,000 blocks nationwide by the appropriate adjustment factor for that post-stratum. See 56 Fed. Reg. 33,626-33,636 (1991); see also David A. Freedman, *Adjusting the 1990 Census*, 252 Sci. 1233, 1234-1236 (1991) (providing a concise description of the process).

Opinions among career professionals at the Census Bureau, and among a panel of outside experts including some of the most highly regarded statisticians in the country, were sharply divided over the accuracy and efficacy of this method of adjustment. See, *e.g.*, 56 Fed. Reg. 33,610-33,623 (1991) (recommendations of panel members). The Secretary determined that because the constitutional purpose of the census is to apportion seats in the House of Representatives, accuracy for adjustment purposes must be defined to mean "distributive accuracy—that is, getting most nearly correct the proportions of people in different areas"—as opposed to an improvement in the accuracy of the total population count at the national level. *Id.* at 33,584; see *id.* at 33,593. Having considered advice both in favor of, and in opposition to, adjustment, the Secretary concluded that there was no clear evidence that an adjustment would improve the distribution of the population, and therefore that no adjustment should be made.

The administrative record provided considerable information regarding the effect the proposed adjustment would have had on the census headcount. The Michigan headcount would have been adjusted upward from 9,295,297 to 9,404,000, but its percentage of the national

population would have declined from 3.7374% to 3.7027%.[3] The adjustment would not have altered the number of congressional seats allotted to Michigan, although it would have resulted in seats being gained by California and Arizona, at the expense of seats being lost by Wisconsin and Pennsylvania. See *Tucker* v. *Department of Commerce*, 958 F.2d 1411, 1413 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992).

3. Petitioners, the City of Detroit and its Mayor, filed this suit against the Secretary of Commerce and the Director of the Census Bureau. Petitioners contended, among other things, that a variety of errors made by respondents in connection with the 1990 census violated the Apportionment Clause of the Constitution, Art. I, § 2, Cl. 3. They did not allege that respondents' conduct caused Michigan to be underrepresented in the House of Representatives; rather, they contended that errors in the census count, and the decision not to use a statistical adjustment, caused Detroit to be disproportionately undercounted relative to other areas of Michigan. See Pet. App. 10a. Petitioners contended that they had standing to challenge respondents' conduct because Detroit's voting strength relative to the rest of the State had been diluted when the Michigan legislature used census figures to redistrict. Petitioners also asserted that they would receive less than an appropriate share of federal funds that are distributed on the basis of census data.

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[3] See Bureau of the Census, United States Department of Commerce, Press Release CB91-221, Table 5 (June 13, 1991). That table is included in Appendix 10 to the administrative record accompanying the Secretary's decision, which has been upheld by the district court for the Eastern District of New York. *City of New York* v. *Department of Commerce*, 822 F. Supp. 906 (1993), appeal pending, No. 93-6183 (2d Cir.) (argued Jan. 5, 1994).

The district court granted summary judgment for respondents. Pet. App. 26a-44a. First, the court concluded that petitioners lack standing. *Id.* at 32a-36a. The court explained that there was no causal nexus between their injuries (political underrepresentation within Michigan and loss of federal funds) and respondents' conduct, explaining that

> the Census Bureau neither creates state and federal legislative districts nor prescribes legislative spending. Those duties are reserved to the Michigan state legislature and Congress. Therefore, the conduct of intervening third parties, not the actions of [respondents], are directly responsible for [petitioners'] claimed injuries.

Id. at 33a. The court alternatively concluded that petitioners lack standing because they had failed to identify any specific constitutional violation for which there was a judicially manageable remedy. *Id.* at 35a-36a. Finally, the court concluded, on the merits, that petitioners had failed to establish a violation of the Constitution, based on its conclusion that the undisputed evidence established that respondents made a good-faith effort to conduct the census as accurately as practicable. *Id.* at 36a-44a.

4. The court of appeals affirmed. Pet. App. 1a-25a. Unlike the district court, the court concluded that petitioners did have standing. *Id.* at 10a-18a. The court accepted the district court's conclusion that any dilution of voting power within Michigan was not attributable to respondents' conduct, *id.* at 10a-14a, but accepted petitioners' argument that they have standing based on the effect of respondents' actions on federal funds, reasoning that "many federal programs do disburse funds based upon population figures as reported in the decennial cen-

sus," *id.* at 16a. Hence, the court concluded that petitioners "were directly affected by the action of [respondents] as that conduct affected *their* city and *their* funds." *Id.* at 18a.

On the merits, the court of appeals concluded that petitioners' suit should be dismissed for failure to state a violation of any judicially enforceable constitutional right. Pet. App. 18a-25a. The court started from the premise that the constitutional command that Congress conduct a decennial census would justify judicial review of a claim that "Congress or the Census Bureau failed (altogether) to conduct a decennial census or failed to conduct a good-faith enumeration, or intentionally reduced some group's representation or funding." *Id.* at 20a. Following the reasoning of the Seventh Circuit in *Tucker*, *supra*, the court reasoned, however, that "merely by directing congressional apportionment in accordance with the decennial census, [the Apportionment Clause] does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." Pet. App. 20a (quoting *Tucker*, 958 F.2d at 1418). Hence, the court rejected petitioners' challenge to the thoroughness of the Census Bureau's efforts in counting Detroit residents (a challenge not repeated in this Court), *id.* at 20a-22a, as well as their challenge to the Secretary's decision not to make a statistical adjustment to the actual enumeration, *id.* at 22a-25a. With respect to the latter claim, the court noted that the district court in *City of New York* v. *Department of Commerce*, 822 F. Supp. 906 (E.D.N.Y. 1993), recently reviewed the statistical adjustment claim and concluded that the Secretary's adjustment decision was not arbitrary, capricious

or contrary to law.[4] Concluding that it would be "impractical for [the court of appeals] to order (the Secretary to do) * * * an adjustment [for Detroit alone] without considering the consequences for the other states and other cities," the court emphasized that petitioners "are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to a census headcount." Pet. App. 24a, 25a. The court accordingly upheld dismissal of petitioners' complaint. *Id.* at 25a.

ARGUMENT

Petitioners argue (Pet. 11-17) that the court of appeals erred in rejecting their claim that the Apportionment Clause entitles them to an order compelling a statistical adjustment to the 1990 census. That argument is incorrect and does not warrant review by this Court.

1. The Court's recent decision in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992) (which is neither cited nor discussed in the petition), makes it clear that the court of appeals correctly rejected petitioners' claims. As the Court explained in *Franklin*, a court evaluating a constitutional challenge to the census can only "review the dispute to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation." 112 S. Ct. at 2777; see *id.* at 2778 (a court should uphold a decision regarding census procedures if it is "consonant with, though not dictated by, the text and history of the Constitution"). Under that

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[4] An appeal of that decision is pending before the Second Circuit. No. 93-6183 (argued Jan. 5, 1994).

standard, petitioners' constitutional claims are meritless.

First, the practice challenged by petitioners is consistent with the constitutional language. The Apportionment Clause, Art. I, § 2, Cl. 3, requires an "actual Enumeration * * * in such Manner as [Congress] shall by Law direct." It is implausible to suggest that this Clause requires the government to forgo reliance on the "actual Enumeration," and instead to rely on statistical estimates, especially in light of the consistent practice, over two centuries, of relying on the actual headcount. Cf. *Franklin*, 112 S. Ct. at 2777 (noting importance of historical practice). Indeed, because the Constitution provides that the actual enumeration may be taken "in such Manner as [Congress] shall by Law direct," there can be no textual basis for setting aside any good-faith effort to conduct an "actual Enumeration." Cf. *Department of Commerce* v. *Montana*, 112 S. Ct. 1415, 1429 (1992) (considerable deference is due Congress's "apparently good-faith choice of a method of apportionment"). As the court of appeals observed, "merely by directing congressional apportionment in accordance with the decennial census, [the Apportionment Clause] does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology." Pet. App. 20a (quoting *Tucker* v. *Department of Commerce*, 958 F.2d 1411, 1418 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992)).

Second, the decision not to adjust does not undermine the goal of equal representation. The adjustment sought by petitioners would not affect the number of seats to which Michigan is entitled in the House of Representatives. See pp. 5-6 & n.3, *supra*; Pet. App. 10a & n.4. Also, the results of the census have no determinate effect on the allocation of those seats among the citizens of Michigan, or in the apportionment of local and state leg-

islative bodies, because neither the Constitution nor any federal statute requires the use of unadjusted census data for intrastate redistricting. See *Senate of California* v. *Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992); *Tucker*, 958 F.2d at 1418-1419; *Young* v. *Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982). Indeed, Michigan officials might have chosen to rely upon unadjusted figures even if the Secretary had determined that an adjustment was appropriate.

Contrary to petitioners' assertions (Pet. 15-16), neither the court of appeals below, nor the decision in *Tucker* on which it relied, held that challenges to the conduct of the census are generally not justiciable. Indeed, the court in *Tucker* specifically rejected contentions that review was barred by the political question doctrine. 958 F.2d at 1415. Rather, *Tucker* focused on the question of whether the text and history of the Constitution provide a judicially enforceable right to a statistically adjusted census. *Id.* at 1416-1419. The holding in *Tucker*, adopted by the court below, that the Apportionment Clause does not include such a right, is correct and consistent with the decision in *Franklin*.[5]

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[5] Furthermore, in our view petitioners have no standing to pursue the constitutional claim presented in the petition. The sole basis for standing identified by the court of appeals was the possible impact on federal funds petitioners might receive in the future. Even if that impact would have sufficient concreteness to justify pressing a challenge under the Administrative Procedure Act, it does not establish an injury to the interests protected by the constitutional provision in question, which protects equal representation. See *Franklin*, 112 S. Ct. at 2776 (opinion of O'Connor, J.) (Massachusetts lacked standing to challenge accuracy of census data in absence of allegation that it would have had an additional Representative if allocation had used more accurate data).

2. Contrary to petitioners' suggestion (Pet. 11-14), the decision of the court of appeals does not meaningfully conflict with the decision of any other circuit. The only court of appeals decision petitioners cite as in conflict, *Carey* v. *Klutznick*, 637 F.2d 834, 838-839 (2d Cir. 1980) (per curiam), was decided long before this Court's decisions in *Franklin* and *Montana*, which clarified the applicable principles. The Court denied a petition seeking review of the same alleged conflict two years ago in *Tucker* v. *Department of Commerce*, 113 S. Ct. 407 (1992). We see no basis for different treatment of the petition in this case.

Furthermore, in our view the Census Act reflects Congress's intent to preclude judicial review of all challenges to the census except in circumstances where the plaintiff has standing based on an injury to its own constitutional rights (in which circumstances the Court has declined to infer preclusion of judicial review, see, *e.g.*, *Franklin*, 112 S. Ct. at 2776 (opinion of O'Connor, J.); *Webster* v. *Doe*, 486 U.S. 592, 603-605 (1988)). Because the injury on which petitioners rely here—an arguably lower share of federal grants—does not injure petitioners' constitutional rights in a manner cognizable under the Apportionment Clause, Congress could preclude judicial review based on such an injury. As we argued in our brief in *Franklin*, the structure of the Census Act—including its timetable for swift completion of the census process—evinces a strong intent to commit the conduct of the census to the Secretary's discretion and to preclude judicial review. See Brief for Appellants at 16-33, *Franklin* (No. 91-1502).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1994